(30)

Supreme Court of the United States

OCTOBER TERM, 1942

No. 917

BERTHA R. LINDER, in behalf of herself and other owners of Manhattan 4% Second Mortgage Bonds,

Petitioner,

against

VAN S. MERLE-SMITH and others, as Protective Committee for Manhattan Railway Company Consolidated Mortgage 4% Gold Bonds,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF THEREON

KATZ & SOMMERICH,
Solicitors or Petitioner.

MAXWELL C. KATZ,
OTTO C. SOMMERICH,
of Counsel.

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Petitioner,

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VAN S. MERLE-SMITH and others, as Protective Committee for Manhattan Railway Company Consolidated Mortgage 4% Gold Bonds,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of BERTHA R. LINDER respectfully shows to this Honorable Court:

Summary and Statement of the Matter Involved

Paul E. Manheim, acting for himself and *other owners of* Manhattan 4% Second Mortgage Bonds (including the petitioner herein), prosecuted an appeal from decrees and orders entered in connection with the carrying out of the Interborough-Manhattan Unification Plan (R. 21, 91). One of the appeals taken by said Manheim was from an order of March 15, 1940, which held that the

Plan was fair, equitable and feasible (*American Brake Shoe & Foundry Co.* v. *Interborough,* 122 F. (2d) 454, cert. denied *Manheim* v. *Merle-Smith,* 315 U. S. 801).

Prior to the entry of the order for the consummation of the Plan, Manheim moved that "the time for dissenters to assent should be extended now by the City and the Committees until thirty days after final decision in the highest court reached by the case until all rights to appeal on a petition for certiorari have lapsed (R. 92).

The United States District Court entered its order directing the consummation of the Plan (R. 26). This Plan limited the recovery of those dissenting to $394.68 per bond; those who assented to the Plan received $500 per bond (R. 32).

The order of the United States District Court (R. 28) also denied the application for an extension of time for dissenters to assent to the Plan.

In the Circuit Court of Appeals, besides arguing that the Plan was unfair and inequitable, Manheim also urged that he should be given at least an amount equal to what he would have received had he assented to the Plan (R. 29). However, the Circuit Court of Appeals affirmed the orders and decrees appealed from, limiting his recovery to $394.68 per bond (R. 46).

Manheim thereafter applied to the United States District Court for an order directing the acceptance of said bonds *nunc pro tunc* upon such terms and conditions with respect to adjustment of interest or otherwise as may seem equitable and proper (R. 37). Said application was denied on the ground that the previous decision was *res adjudicata* (R. 47). He thereafter filed a notice of appeal from the order denying his application for an order directing the acceptance of his bonds *nunc pro tunc* (R. 85), but at the same time decided to surrender his bonds in exchange for the cash, to wit, $394.68 per bond (R. 89).

Thereafter, the petitioner applied for leave to intervene (R. 88-90), on her own behalf and on behalf of other present owners who had not surrendered their bonds, so that she might continue the prosecution of the appeal so taken by Manheim. Said application to intervene was granted (R. 95).

Thereafter a motion was made by the respondents to dismiss the said appeal, and on January 18, 1943, an order was entered dismissing said appeal "because no substantial issues remained for decision (R. 103).

Jurisdiction

The jurisdiction of this Court to issue the writ of certiorari applied for rests upon Title 28 of the United States Code, Sec. 347.

Questions Involved

The questions involved are:

(1) Is the previous decision of the Circuit Court of Appeals, limiting the recovery of the holders of Manhattan Second Mortgage Bonds, *res adjudicata*, preventing such bondholders from making an application to file their bonds *nunc pro tunc* and assenting to the Plan so that they may receive the same amount after adjustment of interest as such bondholders who assented to the Plan?

(2) There being no proof that the appeals taken by the non-assenting bondholders were not in good faith, was it proper to penalize bondholders, who had not assented to the Plan, by depriving them of equal participation therein to those who had not appealed from the orders confirming the Plan?

(3) Is not the decision of the Circuit Court of Appeals in this case in conflict with that of the Eighth Circuit in the case of Warner Brothers Pictures, Inc. v. Lawton-Byrne-Bruner Insurance Agency, et al., 79 F. (2d) 804 (C. C. A. 8)?

Reasons Relied on for the Allowance of the Writ

That the United States Circuit Court of Appeals for the Second Circuit, erred:

1. In deciding that the previous decision of the Circuit Court of Appeals, limiting the recovery of the holders of Manhattan Second Mortgage Bonds, was *res adjudicata,* preventing such bondholders from making an application to file their bonds *nunc pro tunc* and assenting to the Plan so that they may receive the same amount after adjustment of interest as such bondholders who assented to the Plan.

2. In deciding that it was proper to penalize the bondholders who have not assented to the Plan, by depriving them of equal participation to those who have not appealed from the orders confirming the Plan.

3. In not following the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Warner Brothers Pictures, Inc.* v. *Lawton-Byrne-Bruner Insurance Agency, et al.,* 79 F. (2d) 804.

That the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, and has so far departed from the accepted and judicial course of proceedings as to call for the exercise of this Court's power of supervision, and that the decision is in conflict with the ruling of the Circuit Court of Appeals, Eighth Circuit.

WHEREFORE your petitioner prays for the allowance of a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit in the cause entitled *The American Brake Shoe and Foundry Company, et al.,* against *Interborough Rapid Transit Company, et al.;* that said cause may be reviewed and determined by this

Court, and that the order of the said United States Circuit Court of Appeals may be reversed and set aside, and for such further relief and remedy in the premises as this Court may deem meet and proper.

BERTHA LINDER,
By KATZ and SOMMERICH,
Solicitors for Petitioner.

MAXWELL C. KATZ,
OTTO C. SOMMERICH,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1942

No. _____

BERTHA R. LINDER, in behalf of herself and other owners of Manhattan 4% Second Mortgage Bonds,

Petitioner,

against

VAN S. MERLE-SMITH and others, as Protective Committee for Manhattan Railway Company Consolidated Mortgage 4% Gold Bonds,

Respondents.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the District Court is not reported, but may be found on page 91 of the Record.

The opinion of the United States Court of Appeals is not reported, but may be found on page 99 of the Record.

Jurisdiction

The jurisdiction of this Court to issue the writ of certiorari applied for is predicated upon Title 28 of the United States Code, Section 347.

The reasons relied on for the allowance of the writ are:

that the United States Circuit Court of Appeals for the Second Circuit erred in deciding that the previous decision of the Circuit Court of Appeals, limiting the recovery of the holders of Manhattan Second Mortgage Bonds, was *res adjudicata,* preventing such bondholders from making an application to file their bonds *nunc pro tunc* and assenting to the Plan so that they may receive the same amount after adjustment of interest as such bondholders who assented to the Plan;

in deciding that it was proper to penalize the bondholders who have not assented to the Plan, by depriving them of equal participation to those who have not appealed from the orders confirming the Plan;

in not following the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Warner Brothers Pictures, Inc.* v. *Lawton-Byrne-Bruner Insurance Agency, et al.,* 79 F. (2d) 804;

and that the decision of the Circuit Court of Appeals for the Second Circuit is in conflict with the rule that a litigant should not be penalized for seeking a judicial remedy from an erroneous ruling.

Statement of the Case

The statement of the case is set forth in the petition for writ herein.

Specifications of Error

The United States Circuit Court of Appeals erred:

First. In deciding that the previous decision of the Circuit Court of Appeals, limiting the recovery of the holders

of Manhattan Second Mortgage Bonds, was *res adjudicata,* preventing such bondholders from making an application to file their bonds *nunc pro tunc* and assenting to the Plan so that they may receive the same amount after adjustment of interest as such bondholders who assented to the Plan.

Second. In deciding that it was proper to penalize the bondholders who have not assented to the Plan, by depriving them of equal participation to those who have not appealed from the order confirming the Plan.

Third. In not following the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Warner Brothers Pictues, Inc.* v. *Lawton-Byrne-Bruner Insurance Agency, et al.,* 79 F. (2d) 804.

Summary of Argument

I. The previous decision of the Circuit Court of Appeals, limiting the recovery of the holders of Manhattan Second Mortgage Bonds, is not *res adjudicata,* preventing such bondholders from making an application to file their bonds *nunc pro tunc* and assenting to the Plan so that they may receive the same amount after adjustment of interest as such bondholders who assented to the Plan.

II. It was not proper to penalize the bondholders who had not assented to the Plan, by depriving them of equal participation to those who had not appealed from the orders confirming the Plan.

III. The decision is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Warner Brothers Pictures, Inc.* v. *Lawton-Byrne-Bruner Insurance Agency, et al.,* 79 F. (2d) 804.

IV. The decision of the Circuit Court of Appeals is in conflict with the rule that a litigant should not be penalized for seeking a judicial remedy from an erroneous ruling.

ARGUMENT

I

The previous decision of the Circuit Court of Appeals limiting the petitioner's recovery made upon an appeal from an order denying such bondholder's application for an extension of time to assent to the plan until all rights to appeal on a petition for certiorari have elapsed is not *res adjudicata* of an application made after such time has expired. Such decision, before the expiration of said time, being unnecessary to the determination of the issues upon said previous appeal, the doctrine of *res adjudicata* does not apply.

The Circuit Court of Appeals dismissed the petitioner's appeal on the ground "because no substantial issue remained for decision". In other words, that the previous decision of that Court was *res adjudicata.*

Upon the previous appeal, limiting the bondholders' recovery to $394.68 per $1,000 bond, the contention of the dissenting bondholders was that there had been no proceedings which had validly determined the cash distributive shares to which holders of said bonds were legally entitled, and that the foreclosure sale was merely a device to coerce a reluctant holder into the acceptance of the Plan and that in fact the bonds were entitled to be paid in full.

It was unnecessary for a decision on the previous appeal to determine in advance whether the bondholders, after the expiration of time to file their assent to the Plan, should be relieved of their default in doing so.

In other words, the situation is analogous to one where a litigant asks in advance for an extension of time to file his answer to a complaint and his application is denied.

The mere fact that such application is denied is not *res adjudicata* of an application to be relieved of the default thereafter occurring in filing an answer.

Similarly in the case at bar, the decision that the Plan is fair and equitable is not *res adjudicata* of an application to be relieved of a default in not assenting to the Plan.

The decisions are many that an adjudication unnecessary to the determination of the issues previously before the Court is not *res adjudicata* of an application thereafter arising. A judgment does not operate as an estoppel in a subsequent action between the parties as to immaterial or unessential facts even though put in issue by the pleadings and directly decided.

Reynolds v. *Stockton*, 140 U. S. 254, 269; 11 S. Ct. 773, 777;
House v. *Lockwood*, 137 N. Y. 259, 270;
Landon v. *Clark*, 221 Fed. 841;
34 C. J. 928;
2018 Seventh Ave. Inc. v. *Nachaus*, 289 N. Y. 490.

II

There being no contention that the previous appeals, taken by the petitioner to nullify the plan, were not taken in good faith, the petitioner should not be penalized for taking such appeals. There is no proof of any substantial prejudice by the reason of Manheim's previous opposition or appeal.

Jameson v. *Guaranty Trust Company of New York*, 20 F. (2d) 808 (C. C. A. 7), was an appeal by a Committee of

dissenting bondholders from a decree confirming the foreclosure sale of the properties of Chicago, St. Paul & Milwaukee Railroad Company, which decree, among other things, found fair and equitable a Plan of Reorganization of the Railroad. The Jameson Committee contended, as did Manheim in the prior proceedings, that it was entitled to an insurance policy—that is, to a provision in the decree that, if the appeals were unsuccessful, the bonds might, nevertheless, be deposited under the Plan. The Circuit Court of Appeals denied that contention but directed modification of the decree so as "to allay all fear of oppressive or speculative action", by specifically requiring approval of the District Court of any action of the Reorganization Managers in terminating the right to deposit under the Plan. The opinion by Circuit Judge Alschuler, at page 814, states:

> "* * * it is scarcely conceivable, that pending this litigation, and for a reasonable time after its termination, either party will, in this respect, seek, any undue advantage of the other. The objection affects the manner of carrying out the Plan rather than the Plan itself."

Of course, the Jameson case is distinguishable. One significant difference is that "pending this litigation" (emphasis ours) the City has sought and today seeks "undue advantage" of appellant. The Jameson case denied the Jameson Committee its insurance policy, but clearly contemplated subsequent application to the District Court for permission to assent. The Circuit Court of Appeals in the present case went no further than to deny Manheim his requested insurance policy. It made no ruling in respect to any future application which Manheim might make, if, as and when his appeals might be finally determined. The District Court has always retained the *power* to exercise its discretion to permit him, after determination of the appeals, to become an assenter to the Plan, provided that could be accomplished without prejudice to other rights involved.

In the case of *Warner Brothers Pictures, Inc.* v. *Lawton-Byrne-Bruner Insurance Agency, et al.*, 79 F. (2d) 804 (C. C. A. 8), Judge Stone said as follows (p. 820):

> "Obviously, a holder of second bonds could not challenge the plans without withholding his bonds from deposit. If he has a right to challenge the plans in the trial court, he has, generally speaking, a right to test by appeal (without alteration of his rights) an unfavorable determination in the trial court. We say this is true 'generally speaking' because we do not mean to say that in all instances a right of participation may be preserved during appeal. There may be instances where a dissenter has a choice between participation and a payment and where the plan is so formed that it would be seriously endangered by the delay caused by a dissenter's appeal. As to such situations and possibly others, we leave the matter expressly unexamined and undetermined. What we do say is that an appellant from the fairness of a plan of reorganization where his only chance of any realization whatsoever entirely depends upon participation under the plan cannot fairly be denied such participation solely because of delay entirely caused by his prompt prosecution of an appeal from an order approving the plan. This determination does not mean that the plans here involved are rendered void by this defect, but it does mean that this appellant must be allowed to participate in the plans to the extent of any or all of the above second mortgage bonds held by it. Such participation is limited to such of said bonds as it may offer for participation within 20 days after filing below of the mandate of this court on final determination of this litigation."

It is a well-known rule of equity jurisprudence that courts of equity abhor forfeitures. It is not claimed that there has been any prejudice to any one. Consequently, appellant having acted in good faith, his appeal is meritorious and should not have been dismissed.

III

The decision of the Circuit Court of Appeals is in conflict with the rule that a litigant should not be penalized for seeking, in good faith, a judicial remedy from an erroneous ruling.

Natural Gas Pipeline Co. of America v. *Slattery,* 302 U. S. 300; 58 S. C. 199;
Van Dyke v. *Geary,* 218 Fed. 111; Aff'd 244 U. S. 39; 37 S. Ct. 483;
Ex parte Young, 209 U. S. 123, 147; 28 S. C. 441, 447.

In *Natural Gas Pipeline Co. of America* v. *Slattery, supra,* Justice Stone said (p. 204):

> "As the act imposes penalties of from $500 to $2,000 a day for failure to comply with the order, any application of the statute subjecting appellant to the risk of the cumulative penalties pending an attempt to test the validity of the order in the courts and for a reasonable time after decision, would be a denial of due process, * * *"

In *Van Dyke* v. *Geary, supra,* it was said (p. 121):

> "On the authority of these cases and on principle we are of the opinion, and so decide, that said Act 90 of the First Legislature of the state of Arizona imposes such penalties and imprisonment as to practically deprive the complainant of the right to appeal to the court to determine the validity of the law and the orders of the corporation commission, and is therefore unconstitutional in that particular."

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

KATZ & SOMMERICH,
Solicitors for Petitioner.

MAXWELL C. KATZ,
OTTO C. SOMMERICH,
of Counsel.

(29842)

Supreme Court of the United States

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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VAN S. MERLE-SMITH and others, as Protective Committee for Manhattan Railway Company Consolidated Mortgage 4% Gold Bonds, and others,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Proceedings Leading to Present Petition.

This brief is submitted in opposition to the petition of Bertha R. Linder for a writ of certiorari to review an order of the Circuit Court of Appeals for the Second Circuit summarily dismissing an appeal on the ground that no substantial issues remain for decision (R., 102-103). The appeal so dismissed was from an order, hereinafter described, entered by the District Court for the Southern District of New York in the receivership and mortgage foreclosure proceedings of Interborough Rapid Transit Company and Manhattan Railway Company. The memorandum opinion of the Circuit Court of Appeals has not been reported but is set forth on page 99 of the Record, and the opinion of the District Court, also unreported, is set forth at pages 44 to 47 of the Record.

The respondents are the City of New York, which acquired the properties of Interborough Rapid Transit Company and of Manhattan Railway Company on June 12, 1940, pursuant to the Interborough-Manhattan Unification Plan, and the three Contracting Committees under that Plan, which represented the senior debt issues of those companies and which, together with the City and the Transit Commission,* acted as reorganization managers under the Plan.

The petitioner is the owner of $23,000 principal amount of Manhattan Second Mortgage Bonds. She was represented by one Paul E. Manheim in the litigation in the District Court resulting in the various orders and decrees underlying the Plan, in the appeal to the Circuit Court of Appeals from all or part of nine of such orders and decrees, and on the petition to this Court for a writ of certiorari to review the affirmance of such orders and decrees. In such litigation, appeal and petition for a writ, Manheim as a bondholder and as representative of other bondholders, including the present petitioner, raised the precise issue now sought to be raised again by the petitioner: namely, whether a non-assenting bondholder who chose not to deposit his bonds under the Plan within the time provided for therein but instead became entitled to take cash upon a strict enforcement of his legal rights, should subsequently be entitled to insist upon Plan treatment. Manheim was unsuccessful in securing a modification or reversal respecting any point which he urged, including the issue just stated.

> *American Brake Shoe and Foundry Co.* v. *Interborough Rapid Transit Co.*, 122 F. (2d) 454 (1941), cert. denied *sub nom. Manheim* v. *Merle-Smith*, 315 U. S. 801 (1942).

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* The Transit Commission was dissolved by statute effective April 1, 1943. N. Y. Laws 1943, ch. 170.

For convenience, the case just cited will be referred to herein as the *Manheim* appeal.

Despite the fact that the Circuit Court of Appeals in the *Manheim* appeal held that Manheim had been given an "adequate" opportunity to deposit under the Plan and that the District Court decisions "limiting his recovery to $394.68 per bond are affirmed," Manheim nevertheless went back to the District Court after this decision had been rendered and certiorari denied, and moved that an order be entered permitting him to deposit his bonds *nunc pro tunc* under the Plan (R., 37-43). This, of course, was long after the time had expired during which other security holders similarly situated had made their election to take either City securities under the Plan or cash upon a strict enforcement of their legal rights.

The District Court wrote an opinion dated June 18, 1942, denying Manheim's motion (R., 44-47), and on July 6, 1942, an order was entered thereon (R., 48).

Between these two dates Manheim surrendered his bonds and accepted the cash payment to which he was held to be entitled under the decision in the *Manheim* appeal (R., 22). Almost three months after he had surrendered his bonds, and despite the fact that he was thus no longer a bondholder, Manheim filed a notice of appeal from the order of July 6, 1942, still describing himself as the owner of and attorney-in-fact for other owners of bonds (R., 85). A few days later, the petitioner Linder made a motion in the District Court for leave to intervene in order to prosecute such appeal, indicating a fear that Manheim might have waived his right to appeal by surrendering his bonds (R., 86-90).*

---

* This motion to intervene was opposed by the present respondents on the ground that the District Court lacked jurisdiction to permit intervention after the appeal had been taken. The District Court granted intervention (R., 91-95). The question of whether the

On a motion by Linder in the Circuit Court of Appeals to extend her time to file the record and for certain other relief (R., 1-11), the present respondents made a counter-motion pursuant to Rule 7 of the Rules of this Court, to affirm the decision below or in the alternative to dismiss the appeal, on the ground, among others, that the question presented was so unsubstantial as not to require further argument (R., 13-95).*

The appeal was dismissed (R., 99-103), and the present petition is addressed to such dismissal.

Summary of Argument.

There is one question which, if decided adversely to the petitioner, disposes of her petition for a writ: Were the contentions now sought to be raised by the petitioner raised and disposed of in the *Manheim* appeal?

It is the position of the respondents that a mere reading of the opinion of the Circuit Court of Appeals in the *Manheim* appeal shows that the petitioner's present contentions were there urged, considered and adjudicated. A reading of the record and briefs in that appeal results only in making such conclusion doubly certain.

District Court had such jurisdiction, however, has become moot, since the Circuit Court of Appeals, whose jurisdiction the respondents do not contest, itself granted intervention before dismissing the appeal (R., 12, 99).

* The motion to affirm or dismiss, provided for by Rule 7 of this Court, is applicable in the Circuit Court of Appeals pursuant to Rule 7 of that court, which provides:

> "The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable."

Motions to affirm or dismiss have been frequently granted in that court. *E.g., National Surety Company* v. *Universal Transportation Co., Inc.*, 256 Fed. 450 (1919), and *American Brake Shoe and Foundry Co.* v. *Interborough Rapid Transit Co.*, 98 F. (2d) 72 (1938).

Even if the cases cited by the petitioner (*Jameson* v. *Guaranty Trust Co. of New York,* 20 F. [2d] 808 [C. C. A. 7th, 1927], certiorari denied, 275 U. S. 569 [1927], and *Warner Bros. Pictures, Inc.* v. *Lawton-Byrne-Bruner Ins. Agency Co.,* 79 F. [2d] 804 [C. C. A. 8th, 1935]) were relevant to the present petition, they do not support the petitioner's contention. These authorities, however, are without present pertinence, because the issue with respect to which they are cited has already been completely disposed of.

In a word, the petitioner comes to this Court and asks for review on the basis of such a flimsy contention that the Circuit Court of Appeals summarily dismissed the appeal on the ground that the question presented is so unsubstantial as not to require further argument.

POINT I.

The contentions here sought to be raised by petitioner Linder were properly raised by her representative Manheim on the *Manheim* appeal and were fully adjudicated and disposed of on that appeal.

(a) The *Manheim* appeal in the Circuit Court of Appeals.

On the *Manheim* appeal, the nine orders and decrees appealed from included two which found the Plan to be fair and equitable, and found the offers made in the Plan to security holders to be fair, equitable and timely. The Plan thus approved contained a provision defining the period for deposit thereunder as the first three months after the date of consummation. It also provided that such period might be extended by the Contracting Committees, but not beyond six months without the consent of the City (R., 22-24).

The District Court's express finding, affirmed by the Circuit Court of Appeals, that the offers to security holders in the Plan were not only fair and equitable but also "timely," necessarily included approval of the period for deposits under the Plan. Manheim was fully aware of the fact that the approval of the Plan included approval of the exchange period provided for in the Plan. Prior to the entry of the order of June 12, 1940, authorizing and directing consummation of the Plan, Manheim's counsel addressed the court on the question of the exchange period and moved orally that it be extended until thirty days after final decision in the highest court reached by the case. This motion was not granted. Instead, the District Court entered its order reiterating its findings that the Plan was fair and equitable and that the offers to security holders in the Plan were fair, equitable and timely, and authorizing consummation of the Plan. That was one of the orders reviewed and affirmed on the *Manheim* appeal (R., 26-28).

Another order reviewed and affirmed on the *Manheim* appeal was the order of October 30, 1940, respecting instructions to New York Trust Company, the agent designated for making cash payments to non-assenting Manhattan security holders (Record on *Manheim* appeal, Vol. II, pp. 566-575). That order contemplated clearly that cash payments in the amounts theretofore approved by the court should be made to Manhattan security holders who had not assented to the Plan at the close of business on September 26, 1940 (*id.* pp. 568-569).

It follows that even if the petitioner could contend that the question of Plan treatment for non-assenters was not known by Manheim to be involved in his appeal, that fact would not help her; the orders and decrees reviewed on the *Manheim* appeal too clearly embraced that question. But even such contention cannot be made. Manheim did not

merely state that that issue was before the court; he took pains to emphasize the importance of the issue. He said that "the scope of the appeal" was "limited" to the question of whether non-assenters were properly awarded a recovery of $394.68 per bond (R., 28-29). He adverted to the Plan provisions regarding the exchange period, stated that the period ended on September 26, 1940, and recognized that "from that date on the non-assenting security holders were relegated to their 'cash distributive shares to which all holders of securities shall be legally entitled'" (R., 29). He said that as a non-assenter the cash compromise was unfair to him and that he should be given at least the compromise represented by the Plan—$500 per bond in City Corporate Stock (R., 29-30). At the end of his brief, in bold face type, he outlined and numbered his contentions, and included as the third of three his asserted right to Plan treatment if he should be wrong on his other points (R., 30).

The question of whether Manheim and those he represented, including the present petitioner, are entitled as non-assenters to receive Plan treatment could not have been brought to the attention of the court in a more emphatic fashion.

No contention can be made that this question was overlooked by the Circuit Court of Appeals on the *Manheim* appeal. Even if Judge SWAN's opinion had not expressly adverted to that issue, the presumption would be that the court, in rendering its decision, necessarily disposed of all issues the decision of which was requisite to an affirmance of the decrees and orders there reviewed. But Judge SWAN's opinion left no doubt that the Circuit Court of Appeals not only passed upon the issue now sought to be raised, but did so advisedly and with a complete awareness

that the issue was actually being decided. Judge SWAN wrote (122 F. [2d] at p. 457):

> "He [Manheim] asserts no wish to upset the transfer of the properties to the City or to change the participation of assenting security holders, but he asks for an order directing that the bonds he owns or represents be paid in full, or, in the alternative, that a new hearing be granted to determine what amount in excess of $394.68 he is entitled to receive, *or at least that he be given an amount equal to what he would have received had he assented to the Plan.*"*

The court then made an express finding that all security holders were given an *adequate* and *equal* opportunity to deposit under the Plan. The language of Judge SWAN's opinion in this regard is as follows (122 F. [2d] at p. 459):

> "Hence, if the upset price represented a fair valuation, as we have shown that it did, and all security holders were given an adequate and equal opportunity to come in, as they were, we do not think a security holder who elected to take cash can complain because the City was ready to pay a higher price to security holders who were willing to exchange their old securities for Corporate Stock."

It is difficult to see what can constitute an "adequate" opportunity, unless it means an opportunity to deposit which the court found to be sufficient in law. The word "adequate" is defined in Webster's New International Dictionary (2nd Ed., 1936) as including "legally sufficient; such as is lawfully and reasonably sufficient; as an *adequate* cause of passion; an *adequate* remedy." In referring to synonyms, the dictionary says, "ADEQUATE, SUFFICIENT, ENOUGH agree

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* Throughout this brief, italics for purposes of emphasis in quotations have been supplied.

in the idea of competency. That is adequate which is equal to or commensurate with some requirement * * *." The antonym for adequate is "insufficient." The one finding alone, that "all security holders were given an adequate and equal opportunity to come in," should be sufficient to show that the *Manheim* appeal settled the issue now sought to be raised and that therefore the present petition should be denied. Clearly, the petition does nothing except question the adequacy of the opportunity to deposit under the Plan.

The conclusion of the discussion of Manheim's contentions and the holding of the court thereon are stated in the following paragraph of Judge SWAN's opinion (122 F. [2d] at p. 461):

> "Consequently we conclude that Manheim and other dissenters were offered a fair plan or an alternative of sharing in a cash fund fairly established. We are not impressed with Manheim's mathematical arguments advanced to show that he should be paid in full, as they all presuppose the invalidity of the foreclosure sale and the Settlement proceedings which we have sustained. A glance at the earning picture of Manhattan together with a consideration of the time and litigation involved, were all the conflicting claims to be fought through, should convince Manheim that he has fared very well indeed. *The orders and decrees appealed from limiting his recovery to $394.68 per bond are affirmed.*"

(b) Manheim's petition to this Court for certiorari to review the decision of the Circuit Court of Appeals on the *Manheim* appeal.

After the adverse decision in the Circuit Court of Appeals, Manheim petitioned this Court for a writ of certiorari. As stated above, his petition was denied. His

petition and brief, however, again demonstrate clearly the issues which were raised by the *Manheim* appeal.

At the outset, in stating the questions presented, he limited the question as follows (R., 32):

> "The general question presented is whether the legal cash distributive share of non-assenting owners of Manhattan Second Mortgage Bonds has been properly fixed at $394.68 per Bond."

Subsequently he stated one of the specific questions before the court in the following language (R., 32):

> "IV. Whether, if the $394.68 per Bond has not been properly fixed, the Manhattan Second Mortgage Bondholders are entitled on this Record to be paid in full *or to the Plan price of $500 in Corporate Stock* or to a new trial."

Again, Manheim referred to the effect of the exchange period in the following language (R., 32):

> "The opportunity for holders of Manhattan Second Mortgage Bonds to assent and receive $500 in Corporate Stock expired on September 26, 1940 (R. 564-5). At that time, petitioner had the choice of either taking the $500 per Bond or, by prosecuting his appeal, seeking to have his legal rights really determined. The petitioner chose the latter course, although it involved the risk of receiving only $394.68 per Bond."

Under the title "Specification of Errors to be Urged," the second of the two specifications was as follows (R., 32-33):

> "2. The Circuit Court of Appeals erred in not entering an order directing that the non-assenting holders of Manhattan Second Mortgage Bonds should

> receive (1) payment in full on the basis of the existing Record, or (2) a new trial to ascertain what amount in excess of $394.68 per Bond is their legal distributive share, or (3) *$500 in Corporate Stock, the treatment accorded to assenting holders of Manhattan Second Mortgage Bonds.*"

These quotations from Manheim's petition and brief leave no doubt that this Court has already denied certiorari on a consideration of the issue now sought to be raised by Linder when that issue was properly here on the *Manheim* appeal. Linder was represented by Manheim on the *Manheim* appeal, and her remedies are exhausted.

(c) Cases relied on by the petitioner.

A few words should be said regarding *Jameson* v. *Guaranty Trust Company of New York,* 20 F. (2d) 808 (C. C. A. 7th, 1927), certiorari denied, 275 U. S. 569 (1927), and *Warner Bros. Pictures, Inc.* v. *Lawton-Byrne-Bruner Ins. Agency Co.,* 79 F. (2d) 804 (C. C. A. 8th, 1935), both cited by the petitioner.

Initially, it is to be observed that even if these cases constitute authorities which might have lent some support to the appellant's present contention when it was before the court on the *Manheim* appeal, they are of no relevance now. If the decision on that appeal was wrong, the remedy was to seek certiorari. Since certiorari was denied, the petitioner's remedies have been exhausted.

However, the *Jameson* case is not really a decision on the question of extending the exchange period. Both sides there acquiesced in the extension of the exchange period and it therefore was not litigated. The opinion points out that appellee's counsel "openly disclaimed all intent to cut off the exchange right of appellants' bondholders by reason of

the appeal'' (p. 814). Moreover, the appellants represented to the Circuit Court of Appeals that if their appeal should be unsuccessful, they would take new bonds under the plan wholly regardless of what the market price of such bonds might be. Such relinquishment of the right to gamble on the market for City Corporate Stock was never made or even offered by Manheim or those whom he represented. Moreover, the question of the exchange period in the *Jameson* case, if it was before the court, arose at the time when the fairness of the plan was before the court, as it properly should.

Similarly, in the *Warner Bros.* case the question of extending the exchange period came up at the time when the fairness of the plan was before the court. In that case failure to deposit within the time limit would not have given the non-assenter the alternative of a fair cash payment on the enforcement of his legal rights, but would have had the effect of working a complete forfeiture (pp. 819-820). The court recognized expressly that other facts would lead to different holdings, but said that, under the situation then before the court, the right to deposit should be extended.

In both the *Jameson* case and the *Warner Bros.* case, a reorganization was involved. The present case involved a purchase by the City, an outsider. There can be no reason why an outside purchaser should not be permitted to limit an offer to exchange securities to such time as that purchaser desires, so long as the offer is made equally to all and so long as security holders are given the right to receive cash upon enforcement of their legal rights if they choose not to accept the offer. Considerations which might apply in the usual situation where the security holders themselves are reorganizing their own properties cannot, therefore, apply to the present case.

But the question of whether the foregoing authorities have any bearing on the substantive issue sought to be raised is not really a matter which should receive further consideration by this Court. A question settled in one appeal cannot be reopened on a subsequent appeal.

> *Supervisors* v. *Kennicott,* 94 U. S. 498 (1876); *Thompson* v. *Maxwell Land Grant Co.,* 168 U. S. 451, 456 (1897).

In the *Supervisors* case, Mr. Chief Justice WAITE stated the holding of this Court as follows (pp. 498-499):

> "When this case was here on a former appeal, we decided that the mortgage in controversy was valid in favor of *bona fide* holders of the bonds it was given to secure, and that the complainants were entitled to a decree for the amount of the bonds held by them. *Kennicott* v. *Supervisors,* 16 Wall. 468, 471. These questions are, therefore, no longer open; for it is settled in this court, that whatever has been decided here upon one appeal cannot be re-examined in a subsequent appeal of the same suit."

The petitioner attempts to convey the impression that the *Manheim* appeal did not properly dispose of the issue of Plan treatment for non-assenters. The petitioner says (petition, p. 11):

> "The decisions are many that an adjudication unnecessary to the determination of the issues previously before the Court is not *res adjudicata* of an application thereafter arising. A judgment does not operate as an estoppel in a subsequent action between the parties as to immaterial or unessential facts even though put in issue by the pleadings and directly decided."

For these propositions petitioner cites as authorities:

Reynolds v. *Stockton,* 140 U. S. 254, 269 (1891);
House v. *Lockwood,* 137 N. Y. 259, 270 (1893);
Landon v. *Clark,* 221 Fed. 841 (C. C. A. 2nd, 1915);
34 C. J., tit. "Judgments," §1333, p. 928; and
2018 Seventh Ave. Inc. v. *Nach-Haus,* 289 N. Y. 490 (1943).

In none of the cases cited above are the facts in any way similar to those here before the Court. If we accept, however, the petitioner's statement of the proposition for which these authorities stand, her argument is demurrable. It cannot be said that a determination of the fairness of the exchange period provided for in the Plan was "unnecessary to the determination of the issues previously before the Court" on the *Manheim* appeal, or that such determination related to "immaterial or unessential facts." The provision of the Plan regarding the exchange period constituted a part of the offer to security holders. As we have shown, the Plan itself, including such provision, was found to be fair and equitable, and the offers made in the Plan to security holders were found to be "fair, equitable and timely" (R., 23-24). Moreover, the very decisions upon which the petitioner relies—namely, the *Jameson* case and the *Warner Bros.* case, discussed above—create a dilemma for the petitioner; for those cases show clearly that the *proper* time to consider the exchange period under a plan is the time when the adequacy of the exchange period was determined in this case, *i. e.,* when the Plan was before the court on the question of fairness. The petitioner cannot rely upon those two cases and at the same time make use of the argument quoted above.

The only other arguments made by the petitioner are to the effect that all she is asking to have done is to be "relieved of a default in not assenting to the Plan" (petition, p. 11), and that she is being unfairly "penalized" (*id.* p. 14). But the question here has to do with neither defaults nor penalties. The situation here is that an offer which has been found to be fair, equitable, timely and adequate, was made equally to all security holders. Petitioner elected not to accept the offer, but instead to insist upon a cash payment of the value of her legal rights. That election she made with her eyes open to its consequences. She relied upon the mistaken hopes that by litigation she could increase such cash value and that the court would hold the Plan door open for her so that she might have the benefits of the Plan if her litigation did not prevail. In a word, she wanted to eat her cake and have it. Both the District Court and the Circuit Court of Appeals decided against her on the issue of holding open the Plan door, and this Court denied certiorari. This issue is the only one sought to be raised by the present petition and, having once been decided, it cannot be raised again.

(d) The equities of the case.

Even if the petitioner were in a position to raise the issue which she seeks to raise, the equities are all against her. She is one of the few security holders who indulged in the luxury of an appeal requiring a complete review of the basis underlying almost every order and decree entered in connection with the Plan. Those security holders failed to win sympathy or agreement from the Circuit Court of Appeals or this Court on a single point. Actually, the points raised were all in the nature of barren, technical

argument, and they were raised in the face of a Plan offer which was not only adequate and fair, but which erred, if at all, on the liberal side. In the words of Judge SWAN, these security holders "fared very well indeed" (122 F. [2d] at 461).

The burden and expense of defending such orders and decrees against that attack has fallen upon the City, the Transit Commission and the Contracting Committees. That burden and expense has not been small. Since the *Manheim* appeal attacked the very foundation upon which the Plan was based, the opposition to the appeal required painstaking, careful review of the entire Plan proceedings, and was time-consuming in the extreme.

Moreover, in order to secure unconditional title to the Plan properties, the City long ago had to put up the cash required for payments to non-assenting security holders. This money was unconditionally relinquished by the City and the City has had no interest or income therefrom since the date of deposit, January 31, 1941.

It follows that the present petition has no more basis in equity than in law.

Conclusion.

We submit that this petition for certiorari, far from presenting an important issue on which a decision by this Court should be handed down, has failed to present any issue whatever. That the purported issue is completely lacking in substance was the decision of the Circuit Court of Appeals. The petition for certiorari fails to raise any doubt of the correctness of that decision.

The petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit handed down on December 28, 1942, should be denied.

May 3, 1943.

Respectfully submitted,

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